IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES A. DARDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 22769

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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vs.	)	NO. 22765
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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, at the conclusion of trial by jury [C. T. 2-3, 41].[1]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section

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[1] "C. T." refers to the Clerk's Transcript.

174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that Sadie Mae Roberts knowingly imported and brought approximately two ounces of heroin, a narcotic drug, into the United States from Mexico, and that appellant Darden knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C. T. 2].

The second count alleged that Sadie Mae Roberts knowingly concealed, and facilitated the transportation and concealment of, approximately two ounces of heroin, a narcotic drug, which heroin, as she then and there well knew, had been imported and brought into the United States contrary to law. It also was alleged that appellant Darden knowingly aided, abetted, etc., the commission of that offense [C T. 3].

Jury trial of appellant commenced on September 7, 1966, before United States District Judge Fred Kunzel [C. T. 33]. Appellant was found guilty as charged upon each count on September 8, 1966 [C. T. 39].

On October 10, 1966, appellant was sentenced to the custody

of the Attorney General for 5 years in addition to a fine of $5,000, upon each count, to run concurrently, with payment of the fine upon the first count to constitute payment of the fine upon the second count [C. T. 41].

Appellant thereafter filed notice of appeal upon November 29, 1966 [C. T. 52].

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. "The District Court erred in denying appellant's motion to suppress Sadie Mae Roberts' testimony against him and to suppress the tangible evidence admitted against him which has been seized as the result of an unlawful vaginal search of Sadie Mae Roberts."

2. "The District Court erred in ruling that Sadie Mae Roberts' testimony was not the product of influence and coercion and in permitting her to testify before the jury."

3. "The District Court erred in denying appellant's motion for acquittal."

[Appellant's brief, p. 7].

IV

STATEMENT OF THE FACTS

In 1964 or 1965 appellant told Sadie Roberts that he was going to Tijuana (Mexico), and wanted her to bring back some heroin. Miss Roberts went with appellant to Tijuana, and he gave heroin to her, which heroin she brought across the border in an automobile, accompanied by appellant. She returned the heroin to appellant on the American side of the border [R. T. 49-53][2].

Miss Roberts made a number of trips to Tijuana with appellant and could not recall the exact number but believed that there were more than five trips. She brought back heroin upon each occasion. Appellant gave heroin to her in exchange for making the trips. She was not given any monetary compensation [R. T. 50-51, 53, 63].

Automobile rental agency records showed that appellant had rented vehicles from one agency on the following dates and times, with the mileage used by appellant and the rental fees as indicated:

Date of Rental (All 1965)	Time Out	Time In	Total Time	Rental Cost	Total Mileage
April 22	9:00 p. m.	--------	--------	--------	42
April 29	9:30 p. m.	Unknown	Unknown	--------	40
May 6	10:00 p. m.	11:00 p.m.	60 min.	--------	39

[2] "R. T. " refers to the Reporter's Transcript on Appeal.

Date of Rental (All 1965)	Time Out	Time In	Total Time	Rental Cost	Total Mileage
May 13	9:30 p. m.	10:15 p. m.	45 min.	$12.68	40
May 20	9:30 p. m.	Unknown	Unknown	------	40
May 27	9:30 p. m.	11:00 p. m.	-------	$12.60	39
June 3	9:30 p. m.	2:20 p. m. June 4	About 17 hours	------	80
June 19	8 or 9:00 p. m.	10:00 p. m.	60 or 120 minutes	------	42
July 8	8:15 p. m.	--------	-------	------	--

[R. T. 99-101, 103, 112-118, 122-125].

The round-trip distance from the San Diego Airport to downtown Tijuana was approximately 36 miles. Appellant testified that the July 8 rental occurred at the International Airport in San Diego [R. T. 90-91, 110]. The witness from the car rental agency testified that she personally handled two or three of the above-described rentals to appellant prior to the July 8 rental, which she also took care of, and that Miss Roberts was present on almost every occasion prior to July 8 [R. T. 119-120].

On the July 8 occasion, the witness, Miss Berckhemer, asked appellant where his friend was, and he said that she was sick. Appellant testified that Miss Roberts actually was at the International Airport at that time and had separated so that she could park his 1965 Cadillac [R. T. 91, 106, 118-119].

The July 8 trip had commenced in Los Angeles. After appellant and Miss Roberts traveled from Los Angeles to Tijuana, appellant left Miss Roberts in a vehicle, returned in about five minutes, and gave her a quantity of heroin. They went to a service station, where Miss Roberts went to the restroom and put the heroin inside of her vagina. Then they crossed the international border with appellant driving [R. T. 49, 53-57].

The entry into the United States occurred at San Ysidro, California. No merchandise was declared [R. T. 56, 139]. Appellant was "nervous or uncertain." The Customs inspector on duty asked appellant what he was doing in Mexico, and he replied that he was "just looking around." He said that he lived in San Diego, but his driver's license showed that he lived in Los Angeles. He said that the vehicle belonged to him [R. T. 139, 141].

Miss Roberts was taken to a physician, who removed approximately two ounces of heroin from her body. This was the same heroin that appellant had given to Miss Roberts [R. T. 55, 57, 65-66, 68-69].

Miss Roberts testified that she could not recall what she had said to Customs officials but that she believed that she told them that appellant was not involved in the proceeding. Appellant posted $10,000 bail for Miss Roberts [R. T. 42, 64].

Appellant testified and claimed innocence. He testified that he was living with Miss Roberts at the time of the arrest; that he had

been to Mexico with her several times; that he was not aware that she was using heroin; that he gave the rental agency a false address when he rented the vehicle on July 8 at the International Airport in San Diego; that he gave the same false address to the officers when arrested on July 8; and that he gave the same false address to the United States Commissioner three days later [R. T. 81-83, 86-87, 105].

Appellant also testified that he rented vehicles in San Diego on various occasions in April, May, June, and July, 1965; that he lived in Los Angeles; that he was a cook; and that on May 13, 1965, he rented a vehicle, kept it for 45 minutes, during which time he visited some people keeping his children in San Diego, then went to visit a friend of his mother's, then went to visit a Mrs. Rodriguez, and did not leave San Diego, incurring a rental fee of $12.68 [R. T. 82-83, 85, 97-102]. (The vehicle went a distance of 40 miles during the 45-minute period, R. T. 116-117).

Appellant testified that on May 27, 1965, he rented a vehicle and kept it for about 90 minutes, during which time he remained in San Diego, visited his aunt at 41st and Market, visited his children on Kurtz Street, then went to Imperial Avenue and spent some time there, then went downtown to "the Cross Roads" and spent "quite a bit of time" there, and then returned to the airport, incurring a rental fee of $12.60 [R. T. 102-105]. (The vehicle went a distance of 39 miles during the 90-minute period, R. T. 117).

Appellant also testified that on July 8, he drove a vehicle from Los Angeles to San Diego; rented another vehicle at the International Airport in San Diego; went shopping with Sadie Roberts in Tijuana and visited some bars; and separated from her at several bars, where he assumed that she was going to the ladies' room, and also separated at stores, although not sufficiently separated to lose contact with each other [R. T. 83, 88-89].

In testimony partially occurring outside of the presence of the jury, three witnesses testified that Miss Roberts received no promise of a lesser charge in order to induce her to testify [R. T. 37, 44, 62, 76]. There was no evidence to the contrary. The trial judge stated:

> "I will find that there is no question about the voluntariness of the defendant's defendant Roberts testimony. I don't think there is any evidence that she was coerced or that she was promised any benefit of any kind for testifying." [R. T. 47]

The case of Miss Roberts was set for disposition in October, 1966, and a new prosecuting attorney would be in charge of the office when the October date arrived [R. T. 30-31].

V

ARGUMENT

A. THE QUESTION OF ALLEGED UNLAWFUL SEARCH OR SEIZURE CANNOT BE RAISED, FOR THE FIRST TIME, UPON APPEAL.

Appellant contends that the narcotics seized from a body cavity of another person should have been suppressed at his trial and that "the District Court's denial of his motion for suppression was clearly wrong." (Appellant's Brief, p. 21)

However, the "denial" of the "motion" was not erroneous, as there was no motion. Appellant did not move to suppress the narcotics.

Where a motion to suppress evidence is not made in the trial court, the motion cannot be made, for the first time, upon appeal.

Barba-Reyes v. United States, 387 F. 2d 91, 93 (9th Cir. 1967);

Billeci v. United States, 290 F. 2d 628, 629 (9th Cir. 1961);

Stein v. United States, 166 F. 2d 851, 855 (9th Cir. 1948).

While it might be argued that the question may be raised under the "plain errors" doctrine of Rule 52(b) of the Federal Rules of Criminal Procedure, it has been held that the "plain errors" rule does not apply to search and seizure questions.

Billeci, supra, at p. 629.[3]

[3] While there may be a lack of unanimity of authority upon this point, it is respectfully submitted that the logical foundation of the decision in Billeci points the way to the correct result.

B. ASSUMING, ARGUENDO, THAT APPELLANT MAY RAISE AN ISSUE NOT RAISED IN THE TRIAL COURT, HE HAS NO STANDING TO OBJECT TO SEARCH OF ANOTHER PERSON'S BODY CAVITY.

Assuming, for purposes of argument only, that appellant may raise an issue that was not raised in the trial court, he has no standing to object to an alleged violation of the Constitutional rights of someone else.

Wong Sun v. United States, 371 U.S. 471, 492 (1963);

Diaz-Rosendo v. United States, 357 F. 2d 124, 130-34 (9th Cir. 1966);

Armada v. United States, 319 F. 2d 793, 796 (5th Cir. 1963).

Appellant contends that the requirement of standing to object has been eliminated by the Supreme Court decision in Linkletter v. Walker, 381 U.S. 618 (1965). However, Linkletter was not concerned with the elimination of the Fourth Amendment standing requirement, which would have the inevitable result of placing the Fourth Amendment upon a pedestal above all other amendments and articles of the United States Constitution. On the contrary, the Fourth Amendment standing requirement is very much alive:

> "However, we have also held that rights assured by the Fourth Amendment are personal rights, and that they may be enforced by exclusion of evidence only at

the instance of one whose own protection was infringed by the search and seizure."

Simmons v. United States, 390 U. S. 377, 389 (1968).

Appellant argues that the evidence was the "fruit of the poisonous tree" and should be excluded. If the evidence was offered against Sadie Roberts, it would be the "fruit of the poisonous tree," if it be assumed that the lack of evidence upon an unlitigated "issue" can justify a conclusion that the search was unreasonable. However, the evidence was not offered against Miss Roberts. An extension of the "fruit of the poisonous tree" doctrine to appellant Darden, who has no standing, would simply mean an end to the standing requirement. The cases do not support this radical change in the law, with the possible exception of California state cases which cannot overrule the decisions of the United States Supreme Court.

C. THE TESTIMONY OF SADIE ROBERTS WAS PROPERLY RECEIVED IN EVIDENCE.

Appellant asserts that the testimony of Sadie Roberts should have been suppressed because it allegedly resulted from "the government's promise" of favorable action. (Appellant's Brief, pp. 21-22)

Since there is not any evidence whatsoever to support appellant's claim that there was a promise, appellant relies upon imagination and speculation in an attempt to fill the void. Three witnesses testified

that Miss Roberts received no promises of a lesser charge in order to induce her to testify [R. T. 37, 44, 62, 76]. There was no evidence of any promise. The trial Judge stated:

> "I will find that there is no question about the voluntariness of the defendant's (defendant Roberts) testimony. I don't think there is any evidence that she was coerced or that she was promised any benefit of any kind for testifying." [R. T. 47]

If Miss Roberts hoped for some benefit as a result of her testimony, there would be nothing improper in this.

Minkin v. United States, 383 F. 2d 427, 428 (9th Cir. 1967);

Diaz-Rosendo, supra, 357 F. 2d 124, 130 (9th Cir. 1966);

United States v. Marchese, 341 F. 2d 782, 799 (9th Cir. 1965), cert. denied, 382 U. S. 817 (1965);

Audett v. United States, 265 F. 2d 837, 847 (9th Cir. 1959), cert. denied, 361 U. S. 815 (1959).

Cooperation with hope of benefit "is as old as law itself" (Marchese, supra, Judge Barnes speaking for the Court).

> "This still seems to be one tool left to a prosecutor." (Minkin, supra)

D. DENIAL OF THE MOTION FOR JUDGMENT OF ACQUITTAL DID NOT CONSTITUTE ERROR.

Appellant maintains that the motion for judgment of acquittal should have been granted upon the grounds answered under "A", "B", and "C", above. (Appellant's brief incorrectly suggests that the motion to suppress physical evidence was included in the motion for judgment of acquittal, Appellant's Brief, p. 24. It was not, R. T. 130-31).

Appellant also suggests that the evidence was insufficient. He contends that there was an inconsistency, because Miss Roberts testified that she did not remember what she told the Customs officers [R. T. 42, 58], and also testified that she thought that she told them that Darden was not involved in the proceeding [R. T. 42]. It is certainly questionable whether this is an inconsistency or simply an exercise in semantics. At any rate, the testimony of Miss Roberts was supported and corroborated by other evidence in the case, including the numerous rentals of vehicles by appellant, the pattern of the rentals [R. T. 99-101, 103, 112-118, 122-125], the presence of Miss Roberts at the time of the rentals [R. T. 119-120], appellant's false statements to the effect that Miss Roberts was sick when she actually was parking his 1965 Cadillac [R. T. 91, 106, 118-19], appellant's nervousness or uncertainty when he crossed the border with Miss Roberts at the time of the crime [R. T. 139, 141], appellant's false statements when he crossed the

border [R. T. 139, 141], the false address given by appellant on July 8 and July 11 [R. T. 81-83, 86-87, 105], and appellant's incredible testimony regarding the May 13 and May 27 rentals [R. T. 82-85, 97-105, 116-117].

Even though corroboration of the testimony of Miss Roberts was not required, the evidence was clearly sufficient to justify the unanimous verdict of the twelve jurors. Although there was ample corroboration here, a conviction may be based upon the uncorroborated testimony of an accomplice, even though the accomplice is in a position to gain favors and even though there are inconsistencies in the testimony.

Lyda v. United States, 321 F. 2d 788, 794 (9th Cir. 1963).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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